IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/04/2004

CORAM

THE HON'BLE MR.JUSTICE P.D. DINAKARAN
AND
THE HON'BLE MR.JUSTICE T.V. MASILAMANI

Appeal Suit No.54 of 1998

K. Kannan Chettiar .. Appellant

-Vs-

1. The Commissioner, HR & CE
Administration Department
Madras 34.

2. Deputy Commissioner
HR & CE Admn, Trichy 6. .. Respondents

Appeal against the judgment dated 27.8.1996 made in O.S.No.118 of 19 89 on the file of the learned Sub Judge, Tindivanam.

!For Appellant : Mr.V. Raghavachari

^For Respondents : Mr.G. Sukumaran, Spl.G.P.

:J U D G M E N T

(Judgment of the Court was made by
P.D. DINAKARAN, J.)

By consent, the appeal itself is taken up for final disposal.

2. The above appeal is directed against the judgment dated 27.8.1996 made in O.S.No.118 of 1989 on the file of the learned Sub Judge, Tindivanam.

3. The parties are referred to as per their rank in the suit.

4. The plaintiff filed the above suit against the order of the Commissioner made under Section 69 of the Hindu Religious and Charitable Endowment Act (in short "Act") refusing to condone the delay of 4 years 10 months and 7 days in preferring the appeal against the order passed by the Deputy Commissioner on 25.1.1989 made under Section 63(a) of the Act, refusing to permit the plaintiff to grant exemption from the purview of the Act. As a result of the order of the appellate authority, viz. the Commissioner, the

appeal itself stands dismissed on account of the delay in preferring the appeal, against which the plaintiff has preferred the suit under Section 70 of the Act.

5. The learned Sub Judge, Tindivanam, by judgment dated 27.8.1996, holding that Section 70 of the Act provides only an appeal against the final order, dismissed the suit. Hence the above appeal.

6. Mr.V. Raghavachari, learned counsel appearing for the appellant/plaintiff, inviting our attention to Section 70 of the Act, contends that the learned Sub Judge erred to exercise the power conferred under the said Section, which is applicable even against any order passed by the Commissioner.

7. Per contra, learned Special Government Pleader submits that under Section 70 of the Act, the appellant/plaintiff is permitted to file a suit only against the final decree of the order. Therefore, the scope of the appeal is very limited, with respect to the power of the learned Sub Judge to entertain the suit against the order made in an application to condone the delay in preferring the appeal against the order of the Deputy Commissioner.

8.1. In this regard, it is apt to refer Section 70 of the Act, which reads as follows:

"Section 70:

Suits and appeals.- (1) Any party aggrieved by an order passed by the Commissioner -

(i) under sub-section (1) or sub-section (2) of section 60 and relating to any of the matters specified in section 63, section 64 or section 67; or

(ii) under section 63, section 64 or section 67 read with subsection (1)(a), 2 or (4)(a) of section 22 or under section 65 may, within ninety days from the date of the receipt of such order by him, institute a suit in the Court against such order, and the Court may modify or cancel such order, but it shall have no power to stay the order of the Commissioner pending the disposal of the suit.

(2) Any party aggrieved by a decree of the Court under sub-section (1), may, within ninety days from the date of the decree, appeal to the High Court."

8.2. A bare reading of Section 70 of the Act makes it clear that any party aggrieved by an order passed by the Commissioner is permitted to file a suit. It is not in dispute that any order passed by the Commissioner is an order appealable under Section 70 of the Act. Since the order passed by the Deputy Commissioner refusing to condone the delay of 4 years 10 months and 7 days in preferring the appeal gets merged with the final relief sought for in the appeal, applying the doctrine of merger, we are of the considered opinion that the party aggrieved is entitled to prefer a suit under Section 70 of the Act. Failure to exercise the power conferred under Section 70 of the Act by the Commissioner, therefore, requires our interference in the appeal.

9.1. Then the next question arises for our consideration is whether this Court can exercise the power under Order 41, Rule 23, CPC, and go into the merits of the reasons for condoning the delay of 4 years 1 0 months and 7 days in preferring the appeal, against the order of the Deputy Commissioner?

9.2. In this connection, it is pertinent to refer to Order 41, Rule 33, CPC, which reads as follows:
"Order 41, Rule 33, CPC
Power of Court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are, passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:
Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

9.3. A perusal of the Order 41, Rule 33, CPC, makes it clear that the sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court can pass any decree or order which ought to have been passed in the circumstances of the case. The appellate Court can also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. The appellate Court can consider any objection against any part of the judgment or decree of the lower Court. The power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities. The only constraint on the power are that the parties before the lower Court should be there before the appellate Court and that the question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. The expression "which ought to have been passed" means "what ought in law to have been passed" and if an appellate Court is of the view that any decree which ought in law to have been passed was not in fact passed by the Court below, it may pass or make such further or other decree or order as the justice of the case may requi re.

9.4. In the instant case, the appellant seeks to condone the delay of 4 years 10 months and 7 days on the ground that he was unwell, which appears to be genuine and bona fide and in any event, the claim of the appellant/plaintiff to seek exemption from the purview of the Act cannot be set at naught by refusing to disbelieve the reason put forth by the

appellant/plaintiff for condoning the delay in preferring the appeal against the order of the Deputy Commissioner.

9.5. Satisfied with the reason that the appellant/plaintiff was unwell and considering the claim of the appellant/plaintiff before the Deputy Commissioner and also the reasons alleged for condoning the delay of 4 years 10 months and 7 days in preferring the appeal, by exercising the power conferred under Order 41, Rule 33, CPC, we are inclined to condone the said delay and as a result, decree the suit as prayed for and consequently, remit the matter to the Commissioner to entertain the appeal against the order of the Deputy Commissioner and to dispose of the same on merits, within a period of six months from the date of receipt of a copy of this order.

The appeal is allowed. No costs. CMP No.2010 of 1998 is closed.

Index : Yes
Internet : Yes

kpl

To

1. The Sub Judge
Tindivanam.

2. The Record Keeper
VR Section
High Court, Madras.

□